

**United States Department of Labor
Employees' Compensation Appeals Board**

**AUDREY L. JAY, Appellant, claiming as
widow of LOUIS J. JAY**

and

**DEPARTMENT OF THE ARMY, YUMA
PROVING GROUND, Yuma, AZ, Employer**

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**Docket No. 05-1345
Issued: September 16, 2005**

Appearances:
Audrey L. Jay, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 3, 2005 which denied her request for an oral hearing. Because more than one year has elapsed between the most recent merit decision dated March 3, 2004 and the filing of this appeal on June 8, 2005, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for a hearing as untimely.

FACTUAL HISTORY

On June 17, 1985 the employee, a 61-year-old management analyst, filed a traumatic injury claim alleging that he sustained a back injury on that date when the chair he was sitting in collapsed and his back hit the wall. The Office accepted the claim for lumbar strain, cerebral

concussion and postconcussion syndrome. Appellant was placed on the periodic rolls for receipt of temporary total disability.¹

In a letter dated July 11, 2003, appellant, the employee's widow, informed the Office that her husband died on July 9, 2003 and stated that she was "entitled to death benefits." In a letter dated August 15, 2003, the Office advised appellant that she might be eligible for survivor's benefits and enclosed a Form CA-5 to be completed by her. The Office also advised appellant of the medical and factual evidence required to support her claim. On November 20, 2003 the Office received a death certificate which attributed the employee's death to multisystem failure as a result of diabetes and sepsis.

By decision dated December 16, 2003, the Office denied appellant's survivor's claim on the grounds that the conditions listed as the immediate cause of death were unrelated to the employee's accepted conditions.

On January 15, 2004 the Office received a January 15, 2003 report by Dr. Benjamin H. Venger, a treating Board-certified neurological surgeon, who stated that he had "performed a craniotomy with evacuation of subdural hematoma" and noted the decedent "suffered a work-related injury and was on disability for this." He concluded that it was "possible that the injury may have involved his head and he possibly could have had a chronic subdural hematoma that may have been gradually enlarging."

On February 24, 2004 the Office received appellant's request for reconsideration, a December 27, 2003 survivor's claim (Form CA-5) and a December 15, 2003 report and a February 19, 2003² attending physician's report signed by Dr. Venger. Appellant contended that the employee's death "was caused by this postconcussion syndrome," which she contended was due to his accepted employment injuries. In the February 19, 2003 attending physician's report, Dr. Venger attributed appellant's death to cardiopulmonary arrest and indicated a subdural hemotoma as a contributing factor to the employee's death.

By decision dated March 3, 2004, the Office denied modification of the December 16, 2003 decision. The Office found that the evidence submitted was speculative and unsupported by a rationalized medical opinion.

On March 12, 2004 the Office received a March 9, 2004 letter from appellant stating that she had received the rejection letter and was filing an addendum to her compensation claim.

On April 20, 2004 the Office received an April 6, 2004 letter that appellant had written to her congressman. In the letter she stated that she was "not aware of what evidence is required" to support her survivor's claim and asked how she could obtain compensation.

By letters dated May 24 and June 1 and 14, 2004, the Office advised appellant that her claim had been denied on March 3, 2004 and referred her to the appeal rights provided with the

¹ The employee was removed from his position effective April 14, 1986.

² The "2003" date appears to be a typographical error since the employee died on July 9, 2003 and the Office noted the date as February 19, 2004.

decision. The Office also informed her that “these appeal rights do come with specific time frames.”

On March 23, 2005 the Office received a February 16, 2005 request from appellant for an oral hearing, which was postmarked that day.

By decision dated May 3, 2005, the Office denied appellant’s request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees’ Compensation Act provides that a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.³ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁴ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.⁵ The Office’s procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

“If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.”⁶

ANALYSIS

Subsequent to the issuance of the Office’s March 4, 2004 decision, appellant requested an oral hearing before an Office hearing representative on February 16, 2005. Section 10.616(a) of the federal regulations provides: “The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.”⁷ As the postmark date of the request was more than 30 days after issuance of

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. §§ 10.616, 10.617.

⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (b)(3) (October 1992).

⁷ 20 C.F.R. § 10.616(a).

the March 3, 2004 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office properly found in its May 3, 2005 decision that appellant was not entitled to an oral hearing as a matter of right because her request was not made within 30 days of the March 3, 2004 decision.

The Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right. The Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the issue could be equally well addressed by requesting reconsideration and submitting additional evidence to establish a causal relationship between the cause of death and the accepted injury. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁸ In the present case, the evidence of record reflects that the Office properly denied appellant's request for an oral hearing and exercised its discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely.

⁸ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2005 is affirmed.

Issued: September 16, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board